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No. 81-134

IN THE

Supreme Court of The United States

WILLIE POWELL,

Petitioner

vs.

ELIZABETH POWELL,

Respondent

RESPONSE TO
PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA AND TO THE THIRD DISTRICT COURT OF APPEAL

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QUESTIONS PRESENTED FOR REVIEW

I

WHETHER THE CALIFORNIA SUPERIOR COURT IN AND FOR THE COUNTY OF SACRAMENTO, THE CALIFORNIA THIRD DISTRICT COURT OF APPEAL AND THE CALIFORNIA SUPREME COURT COMMITTED ERROR WHICH IS REVERSIBLE BY THE SUPREME COURT OF THE UNITED STATES IN RULING, BEFORE THE DECISION IN McCARTY v McCARTY (decision June 26, 1981, S Ct. 80-5) THAT THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION DID NOT PRECLUDE CALIFORNIA STATE COURTS, PURSUANT TO A STIPULATION OF PARTIES TO THAT COURT'S JURISDICTION, FROM DIVIDING MILITARY RETIREMENT PAY OF AN ALREADY RETIRED EX-SERVICEMAN PURSUANT TO STATE COMMUNITY PROPERTY LAW AS SUCH EXISTED BEFORE THE 26 JUNE 1981 DECISION IN McCARTY v McCARTY, SUPRA.

PARTIES TO THE PROCEEDING

See Petition, page 1.

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121 C 482,385-486

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90 CA3d 454

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287 US 358, 365

Hisquierdo v. Hisquierdo 2
439 US 581

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123 CA3d 17

Linkletter v. Walker 7
381 US 618

McCarty v. McCarty 1,4,5,6,7
(decision June 26,1981, S. Ct.80-5)

Constitution

Article III, Section 2 1,7

Article 6, Section 2 1,7

Rules of Court

California Rules of Court 1,4
Rule 24 (a)

REFERENCE TO OPINIONS BELOW

See Petition, page 1.

JURISDICTION

See Petition, page 1.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

See Petition, page 2, and in addition Respondent includes the following:

California Rules of Court, Rule 24 (a), which reads in pertinent part as follows:

> "All decisions of the reviewing courts shall be filed with the clerk, who shall forthwith transmit a copy of the opinion to the lower court or tribunal and to the parties. A decision of the Supreme Court becomes final 30 days after filing unless the court orders a shorter time or, prior to the expiration of the 30 day period or any extension thereof, orders one or more additional periods of time not to exceed a total of 60 additional days."

Article III, Section 2, of the Constitution of the United States reads in pertinent part as follows:

"The Judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;..."

STATEMENT OF CASE AND FACTS RELEVANT TO THE QUESTION

This case involves a Stipulated Interlocutory Decree of Dissolution, entered, which divided the property and debts and set the child custody and support duties of parties and reserved jurisdiction in the Court to determine the nature of one-half (1/2) of 20/23rds of the vested ex-enlisted man's retirement rights. Powell v. Powell, with present Petitioner and Respondent decided post Hisquierdo v. Hisquierdo, 439 US 581, and post Gorman v Gorman, 90 CA3d 454, and after Petitioner retired from military service, that such retirement pay was community property following the State Courts long and daily followed historical position and such decision of the State Court became a final

State decision 30 days after 22 April 1981.

The Petitioner Husband has not alleged any payment of retirement funds under the State Court order or other damage, save the declaration of the California Court itself.

The Petitioner Husband created the Interlocutory Decree by Stipulation with Respondent Wife which Stipulation granted among other things the right and duty of the State to categorize the property as separate or community by Stipulated Interlocutory Decree, see Respondent's Appendix E, allowing the Court to reserve jurisdiction for that purpose.

Said State Court's determination was made after hearing on 28 December 1979, following a very long and relied upon, if not unquestioned property rule at a time when the applicable law also included Cooley v. County of Calaveras, 121 C 482 at 485-486, governing the effect of stipulations. The petitioning Husband had at that time already retired after 23 years of service.

There was no limitation placed at any stage of State hearings on the right of either party to appeal or otherwise contest the state decisions.

Cooley v. County of Calaveras, supra, and the later and very recent post McCarty case of In re Mahone 123 CA3d 17 (which held that a completed Stipulation that military retirement was community property in a California Court settlement can not be affected by a later case decision such as McCarty,supra) is based on the California rules of Stipulation and finality of decision.

The case presently before the Court, Powell v. Powell, is a hybrid in which a Stipulation was to allow the State to determine the nature of the retirement fund, and where by the rules of California Court decision's pursuant to the Stipulation, the decision was final before McCarty v. McCarty, supra, was pronounced, by California Rules of Court, Rule 24 (a) and see, In re Mahone,

supra.

The ruling of the California Court in Powell v. Powell is representative of a vast number of such decisions which were daily made prior to 26 June 1981 with the Court and parties before it innocently and justifiably relying on the existing state laws as a fact of marital contracts and decisions thus entered.

Respondent assumes the McCarty v. McCarty decision added the following legal premises to the existing fact and state law.

On 26 June 1981 there was held to be a conflict of terms between state and federal law and the federal scheme of military retirement benefits were held to be threatened with grave harm to "clear and substantial" "federal interests" and potential frustration of the Congressional objectives and goals of using the retirement to induce enlistment and re-enlistment. See pages 22 - 25.

The decision of McCarty v. McCarty, supra,

contained no statement as to retrospective versus purely prospective application except that the McCartys were bound by the decision.

REASONS FOR DENYING THE WRIT

The purpose of the federal position announced in McCarty v. McCarty, supra, does not require retrospective application to affect an ex-serviceman's rights which have been previously decided by a State Court pursuant to a Stipulation to jurisdiction.

Such application would

(i) have negligible, if any, effect on the announced purpose of the McCarty v. McCarty, supra, decision, i.e., to protect federal plans and goals of the federal government regarding servicemen. See, Brown v Louisiana, 447 US 323 at 327.

(ii) create great hardship on the many families who have by necessity, innocently and justifiably relied on and planned pursuant to those existing

state property laws.

Such would be contrary to Great Northern R Co V. Sunburst Oil & Refinery Co., 287 US 358, 365; Chicot County Drainage District v. Baxter State Bank, 308 US 371; Linkletter v. Walker, 381 US 618; and Cipriano v. City of Houma, 395 US 701, 706.

(iii) require recalling for review a multitude of such cases and would impose a formidable cost and boundless new determinations requiring involved remedial rulings attempting to provide solutions to family financing problems.

Article III does not, the Supremacy Clause does not, nor does any other section of the Constitution require retrospective application. Brown v. Louisiana, supra, and Linkletter v Walker, supra.

McCarty v. McCarty, supra, does not state which if any, or when if any, time before 26 June 1981, the facts which became

determinant did so, but the need for present and prospective protection is emphasized.

The standards for non-retrospective application under Brown v. Louisiana, supra at 327, disclose a need for prospective enforcement and non-retro (PHS) application.

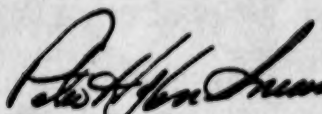
The facts require that save for the McCartys that decisions be applied purely prospectively for retrospective application in our case simply would not affect the federal interests or goals existing 26 June 1981, presently, or in the future, where all parties are retired mature civilians and where the States property rules have been innocently relied upon, regardless of their correctness, and retrospective corrections would be an immense burden on the administration of justice.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Respondent respectfully prays that this

Honorable Court deny the issuance of a Writ of Certiorari as McCarty v. McCarty, supra, should be purely prospective in application to all cases save McCarty.

Respectfully submitted,



Peter H. Smurr
Attorney for Respondent

RESPONDENT'S APPENDIX E

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SACRAMENTO

In re the marriage of	Case Number
ELIZABETH POWELL,	737055
Petitioner,	STIPULATED INTERLOCUTORY JUDGMENT OF DISSOLUTION OF MARRIAGE
and	
WILLIE POWELL,	
Respondent.	

IT IS FURTHER ORDERED:

PROPERTY DIVISION

The Petitioner is awarded:

1. The family home at 3637 Karl Drive, North Highlands, California,
2. The household furniture and furnishings,
3. The 1970 Ford Torino automobile.

The Respondent is awarded:

1. The bar from the residence at 3637 Karl Drive, North Highlands, CA.,
2. The 1973 Mazda automobile.

SPOUSAL AND CHILD SUPPORT

1. The Respondent is to pay the sum of $300.00 a month for the support of Reginald and Linda (i.e. $150.00 per month for each child) until each of the above-mentioned children attain the age of majority. Said payments are to being in October of 1978.

2. Respondent is to pay to Petitioner the sum of $100.00 per month as spousal support for a period of 5 years, commencing in October 1978.
3. Commencing in October of 1983, spousal support will be the sum of $1.00 per year.
4. The spousal and child support provisions herein are subject to modification by the Court.

RETIREMENT RIGHTS

1. Petitioner is to be credited with 20.5 years' interst in Respondent's military retirement if same is determined to be community property. Jurisdiction to determine the issue of whether said retirement is community property is reserved. If said military retirement is determined to be community property, Respondent is to be credited with $600.00 of those retirement benefits to compensate for the otherwise unequal division of community property.

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DATED:

/s/Elizabeth Powell
ELIZABETH POWELL
Petitioner

DATED: 11 December 1978

/s/ Willie Powell
WILLIE POWELL
Respondent

/s/ Peter H. Smurr
PETER H. SMURR
Attorney for Petitioner

/s/ Lillian A. Jenks
LILLIAN A. JENKS
JENNINGS & JENKS
Attorneys for Respondent

DATED: Jan. 23, 1978

/s/ JOSEPH A. DeCRISTOFORO
Judge of the Superior Court

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This Appendix E contains only an excerpt of the pertinent parts of the Stipulated Interlocutory Judgment of Dissolution of Marriage.

This Stipulated Interlocutory Judgment of Dissolution of Marriage was filed by the Court on January 23, 1979.

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WILLIE POWELL,

Petitioner,

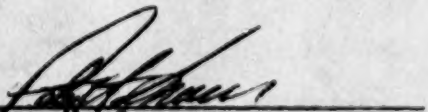
v.

ELIZABETH POWELL,

Respondent.

ENTRY OF APPEARANCE

PETER H. SMURR, a member of the Bar of the State of California and the United States Supreme Court does make an entry of appearance for the purpose of filing, briefing and arguing this Response to Writ of Certiorari and subsequent matters and does make this document an entry of appearance for all purposes.



Peter H. Smurr

DECLARATION OF SERVICE BY MAIL

I, PETER H. SMURR, a member of the Bar of this Court and counsel of record for Respondent, hereby declare that on this 23rd day of October, 1981, I served the within Response to Petition for Writ of Certiorari to the Supreme Court of the State of California and to the Third District Court of Appeal on the California Supreme Court, The Third District Court of Appeal, The Honorable Joseph A. DeCristoforo, Judge of the Superior Court, State of California and Carl M. Stein, by placing a true copy thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States mail at Carmichael, California.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 23 October 1981 at Carmichael, California.

Peter H. Smurr